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No. 97-746

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,

Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondents respectfully submit this response in opposition to the Petition for a Writ of Certiorari and the Supplemental Brief for Petitioner filed by General Motors Corporation ("General Motors"). Contrary to the assertions in General Motors' petition, the rulings of the Sixth Circuit Court of Appeals at issue in this matter do not foreclose all avenues of review of a district court's order compelling disclosure of allegedly privileged documents. The Sixth Circuit, in line with the majority of other circuit courts of appeal, allows mandamus review of discovery orders involving a claim of privilege in

appropriate cases that meet the high standard for granting such extraordinary relief. The Sixth Circuit denied General Motors' petition for writ of mandamus not on jurisdictional grounds but rather because it did not meet the well-established standard for review of such petitions. Under these circumstances, as discussed more fully below, General Motors' Petition for Writ of Certiorari fails to present issues appropriate for review by this Court and should be denied.

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 26(a)(1) provides in relevant part:

> **(1) Initial Disclosures.** ...[A] party shall, without awaiting a discovery request, provide to other parties:
>
> ...
>
> (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings.

Federal Rule of Civil Procedure 26(b)(5) provides:

> **(5) Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these

> rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

STATEMENT OF THE CASE

Respondents present this brief factual statement in order to clarify the circumstances leading to the decisions of the magistrate and district judges and the Sixth Circuit that are at issue in the petition filed by General Motors.

Respondents Valorie Grear and her husband filed this lawsuit in 1996, alleging that the serious injuries that Ms. Grear suffered as a result of a 1995 accident in a General Motors vehicle resulted from the defective design of the car's door-mounted passive restraint and door lock systems. At the time that Respondents filed their lawsuit, an internal General Motors Automatic Restraint Task Force ("Task Force") had studied General Motors' door-mounted restraint systems. Respondents were not aware of the Task Force or of the documents related to its work, including a 1990 "Task Force Memorandum" prepared by members of the Task Force. According to General Motors, the memorandum, which is at the core of this petition, was prepared for the purpose of "analyzing available technical information related to the use of automatic belt systems." (Pet. at 3).

Despite the undisputed relevance to Respondents' claims of the Task Force Memorandum and other Task Force documents, General Motors failed to disclose them in its initial disclosures as mandated by Federal Rule of Civil Procedure 26(a)(1) or to claim them as privileged and describe them as required by Rule 26(b)(5). When Respondents later learned of the existence of the Task Force from another source, Respondents submitted document requests to General Motors that specifically requested all Task Force documents. Respondents also propounded an interrogatory requesting a privilege log for all documents that General Motors had withheld on a claim of privilege.

In response to Respondent's discovery requests, General Motors objected to the production of the Task Force documents as privileged but did not produce the privilege log as requested or identify the withheld documents in any manner. When respondents filed a motion to compel production of the Task Force documents, General Motors still did not produce the documents, including the Task Force Memorandum, or comply with Rule 26(b)(5), which requires that documents withheld on a claim of privilege be identified "in a manner that ... will enable other parties to assess the applicability of the privilege or protection." At most, General Motors filed an affidavit describing the Task Force but not the hundreds of documents it claimed were privileged. (Pet. App. 22a). Only after the magistrate judge instructed General Motors to produce a privilege log did General Motors provide any information to Respondents that identified the documents that it was withholding as privileged. Although General Motors submitted the Task Force Memorandum to the magistrate judge to review in camera, the magistrate judge found that the ex parte submission of the withheld documents to the court did not satisfy the Rule 26(b)(5) requirement that General Motors describe the

documents so that the other party could assess the applicability of the privilege. (Pet. App. 6a).

In light of this conduct on the part of General Motors, the magistrate judge held that General Motors had waived its right to claim that the Task Force Memorandum was privileged. (Pet. App. 6a). In so holding, the magistrate judge followed the Advisory Committee Notes to the 1993 Amendments to Rule 26, which state that the withholding of otherwise discoverable materials without proper notification and identification "may be viewed as a waiver of the privilege." (Pet. App. 4a-5a). The district court affirmed the magistrate's order following an independent review of the record and the magistrate's findings. (Pet. App. 10a).

General Motors immediately appealed the district court's ruling to the Sixth Circuit Court of Appeals and also petitioned the Sixth Circuit for a writ of mandamus. Respondents moved to dismiss the appeal on jurisdictional grounds and filed a response in opposition to the mandamus petition. In separate orders dated September 17, 1997, the Sixth Circuit dismissed the appeal and denied the mandamus petition. (Pet. App. 14a-15a, 16a-17a). The Sixth Circuit ruled that it did not have jurisdiction of the appeal as either a final order under 28 U.S.C. § 1291 or as a "collateral order." (Pet. App. 15a). The court also ruled that General Motors' petition did not meet the standard for mandamus in that other means of obtaining relief existed, namely that General Motors could "obtain appellate review by submitting to contempt and appealing the contempt ruling." (Pet. App. 16a-17a).

General Motors then filed its petition for certiorari and application for stay with this Court. When this Court denied the stay application, General Motors finally produced the Task Force Memorandum to Respondents. Respondents waived the filing of

a response to the petition for certiorari and now submit this response as requested by the Court.

SUMMARY OF ARGUMENT

General Motors' petition asks the Court to grant certiorari in order to consider the proper mechanism for a party to assert an immediate challenge in the courts of appeal of a district court order compelling the disclosure of allegedly privileged documents. General Motors bases its petition on two rulings by the Sixth Circuit that, General Motors claims, dismissed both its appeal and its writ of mandamus on jurisdictional grounds.

Respondents respectfully disagree with the fundamental premise asserted by General Motors that the Sixth Circuit has imposed a rigid, jurisdictional bar to the interlocutory review of any discovery ruling involving a claim of attorney-client privilege. The Sixth Circuit, like all other courts of appeal except the Third Circuit, holds that discovery orders are not appealable as of right but may be considered on a petition for writ of mandamus under appropriate circumstances. The alleged jurisdictional bar to mandamus review in the Sixth Circuit simply does not exist, as specifically demonstrated by the recent Sixth Circuit opinion in In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997), in which the court granted mandamus review of a district court order compelling production of a corporate report withheld on a claim of privilege.

Unlike the important question of law presented by the Perrigo petition, the issue underlying General Motors' petition for writ of mandamus is the decision by the district court, acting within its broad discretion to control discovery, that General Motors waived its claim of privilege as a result of its discovery

abuses. Based upon these circumstances, the Sixth Circuit ruled that General Motors' petition did not merit mandamus review.

Likewise, General Motors' petition for writ of certiorari does not present special and important questions of federal law that warrant review by this Court. A means of reviewing district court decisions regarding the production of documents purported to be privileged is available in every circuit. That the Sixth Circuit did not deem General Motors' mandamus petition adequate for review does not create an issue of significance to the administration of justice in the federal courts.

ARGUMENT

General Motors contends that its petition for writ of certiorari "cleanly presents a basic procedural issue ... on which there is a clear and irreconcilable three-way split among the circuit courts of appeals." (Pet. 6-7). This assertion is incorrect as to both issues presented for review by General Motors.

First, there is not a three-way split as to the issue of whether a discovery order, even one involving a claim of attorney-client privilege, is immediately appealable under the collateral order doctrine. In fact, every circuit identified by General Motors except one agrees that discovery orders are not appealable as collateral orders. See cases cited at Pet. 10-11. Only the Third Circuit in In re Ford Motor Co., 110 F.3d 954 (3d Cir. 1997), holds otherwise. The Sixth Circuit joins with the majority in concluding that this Court's decision in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), does not compel appellate review of discovery orders. See Federal Deposit Ins. Corp. v. Ernst & Whinney, 921 F.2d 83, 85 (6th Cir. 1990); Dow Chem. Co. v. Taylor, 519 F.2d 352, 354-55 (6th Cir.), cert. denied, 423 U.S. 1033 (1975). The reason for this

conclusion is well founded. As the Sixth Circuit has explained, to allow appellate review of discovery orders "would '... invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters.'" Dow, 519 F.2d at 354 (citations omitted).

Second, the Sixth Circuit has not held that it is without jurisdiction to review on mandamus a discovery order involving a claim of attorney-client privilege. Indeed, in a published opinion decided after the denial of General Motor's petition, In re Perrigo Co., 128 F.3d 430 (6th Cir. 1997), the Sixth Circuit specifically addressed this issue and held that the petition in that case met the standard for mandamus review of an order compelling the production of a corporate report withheld on a claim of privilege. (Id. at 437). As noted by the Perrigo court, the Sixth Circuit has traditionally held that mandamus is available to review "'questions of unusual importance necessary to the economical and efficient administration of justice,'" or "important questions of first impression." Id. at 435 (quoting EEOC v. K-Mart Corp., 694 F.2d 1055, 1061 (6th Cir. 1982)). The court reiterated its preference for "a 'flexible' rather than a 'rigid' approach" in deciding which cases merit mandamus review in order to preserve the availability of the writ in extraordinary situations. Id. (quoting In re Chimenti, 79 F.3d 534, 539 (6th Cir. 1996)).

In order to determine which cases warrant mandamus review, the Sixth Circuit balances the following five factors:

1. The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.

> 2. The petitioner will be damaged or prejudiced in a way not correctable on appeal. . ..
>
> 3. The district court's order is clearly erroneous as a matter of law.
>
> 4. The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
>
> 5. The district court's order raises new and important problems, or issues of law of first impression.

Id. (quoting Chimenti, 79 F.3d at 540 and In re Bendectin Products Liability Litigation, 749 F.2d 300, 304 (6th Cir. 1984)). These factors are the same as or similar to those considered by all other circuits in the more recent decisions cited by General Motors, with the exception only of the Third Circuit in its In re Ford decision. See In re Regents of Univ. of Cal., 101 F.3d 1386, 1388 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 1484 (1997); In re Bieter Co., 16 F.3d 929, 932 (8th Cir. 1994); Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992); Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1490-92 (9th Cir. 1989); In re Burlington Northern, Inc., 882 F.2d 518, 523 (5th Cir. 1987), cert. denied, 484 U.S. 1007 1988). None of these courts grants automatic mandamus review of discovery orders requiring disclosure of allegedly privileged documents; rather, each requires that the issue presented turn on an important question of law, not a mere discretionary decision of the lower court. See also Boughton v. Cotter Corp., 10 F.3d 746, 751 (10th Cir. 1993) (denying mandamus petition because rulings on privilege, even if wrong, were not clear abuse of discretion).

General Motor's petition for writ of mandamus simply did not meet this standard. The district court in this case exercised its discretion under Rule 26 to control discovery and to ensure compliance by the parties with the procedures established by the federal rules. The district court's determination that General Motors waived its right to claim privilege as to the Task Force Memorandum did not turn on the court's importing a "rigid," "extratextual requirement to create a privilege log into Rule 26," as General Motors erroneously contends (Pet. 13), but rather on the facts of General Motors' own conduct in willfully disregarding the requirements of Rule 26. As the magistrate judge stated:

> Therefore, under these circumstances, this court finds that defendant GM's failure to list the Task Force documents or otherwise make a timely or reasonable effort to identify those documents in its Rule 26(a)(1) disclosures and in response to specific discovery requests resulted in a waiver of the claimed privileges.

(Pet. App. at 6a). General Motors' representation to this Court that "it is plain that General Motors complied with the absolute letter and spirit of this Rule [26]" is directly contradicted by the magistrate judge's finding that General Motors exhibited "persistent delay" in identifying privileged documents and "willful disregard for the notification requirements of Rule 26." (Pet. App. 6a).

Notably, this is not the first time that a district court has sanctioned General Motors for refusing to identify the Task Force documents in compliance with Rule 26. In Maxey v. General Motors, No. 3:95cv6-D-A, 1996 WL 692222 (N.D. Miss. Nov. 18, 1996), the district court affirmed the ruling of the magistrate judge that General Motors waived its right to assert its

claim of privilege as to the Task Force Memorandum by failing to identify the document as required by Rule 26(b)(5). (Brief App. 8a-10a). As in the present case, General Motors sought mandamus review of the district court order, and the Eighth Circuit, like the Sixth Circuit, denied the mandamus petition. See Maxey v. General Motors, No. 3:95cv6-D-A, 1997 WL 88214 (N.D. Miss. Jan. 10, 1997) (Brief App. 13a).

Likewise, the district court in Baranowski v. General Motors, No. LR-C-96-222 (E.D. Ark. May 15, 1997), held that General Motors waived its claim of privilege as to the Task Force Memorandum by failing to comply with the requirements of Rule 26. (Brief App. 21a). The Baranowski case settled prior to a ruling by the Eighth Circuit on General Motor's petition for writ of Mandamus.

As these cases show, General Motors was clearly on notice by the time of the magistrate's ruling in this case that its refusal to identify the Task Force documents would result in the waiver of its claim of privilege. Given all of the circumstances in this matter, the district court's finding of waiver was not a clear abuse of discretion.

As a result, the Sixth Circuit recognized that General Motors' mandamus petition did not meet the standard that "[a] party seeking mandamus must have no other means of obtaining the relief he desires and must demonstrate a 'clear and indisputable' right to that relief." (Pet. App. 16a (citing Kerr v. United States District Court, 426 U.S. 394, 402 (1976)). The court denied the mandamus petition in this case because it found that General Motors had an adequate remedy other than mandamus; it could refuse to comply with the district court's order, submit to contempt and then appeal the contempt ruling. This was not a dismissal on jurisdictional grounds, as General

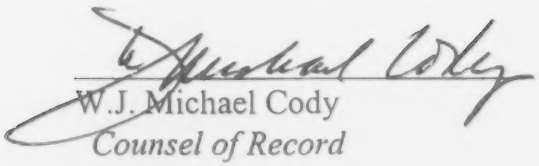
Motors now asserts, but a denial of the petition because General Motors failed to present an issue that warranted mandamus relief.

General Motors' petition for writ of certiorari thus fails to raise an issue of importance to the administration of justice in the federal courts and should therefore be denied.

CONCLUSION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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February 5, 1998

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY, PLAINTIFF

v. Civil Action No. 3:95cv6-D-A

GENERAL MOTORS CORPORATION DEFENDANT

MEMORANDUM OPINION

By order dated September 19, 1996, United States Magistrate Judge S. Allan Alexander denied as untimely the defendant's motion for a protective order so that it would be relieved of the obligation to produce certain documents to the plaintiff in discovery. Maxey v. General Motors Corp., Civil Action No. 3:95cv6-D-A (N.D. Miss. Sep. 19, 1996) (Alexander, M.J.) (Order Denying Motion for Protective Order). On September 27, 1996, the defendant filed an appeal of this order of the Magistrate Judge. The plaintiff responded to this filing on October 17, 1996, and also moved to strike the appeal or, in the alternative, to dismiss the appeal. After having considered the order of the Magistrate Judge and the submissions of the parties, the undersigned is of the opinion that the order is neither clearly erroneous nor contrary to law. The undersigned shall not modify or set aside Judge Alexander's order of September 19, 1996.

The crux of the defendant's original motion before the Magistrate Judge was that the documents which the plaintiff sought produced and the defendant sought protected were protected by the attorney-client and "self-critical analysis" privileges. The Magistrate Judge never reached the actual

question of whether or not the documents were in fact protected by these privileges, however, but rather denied the motion for two particular reasons: 1) the motion itself was untimely; and 2) the claims of privilege asserted for these documents were untimely.

I. DISCUSSION

A. Appeal or Objection?

The plaintiff's first ground in opposition to this court's consideration of the matter at hand is the argument that there is no mechanism within the Federal Rules of Civil Procedure for the defendant to "appeal" the order of the Magistrate Judge to the undersigned. Rather, the only proper review of the Magistrate Judge's order by this court would be pursuant to Fed.R.Civ.P. 72(a) by the filing of "objections" to the order within ten days of its entry. Fed.R.Civ.P. 72(a). The plaintiff is correct that this court's review of the Magistrate Judge's order is pursuant to that rule, and this court will only modify or set aside that order if it is "clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a). That the defendant styled its pleading in this matter as an "appeal" is a mere semantical distinction, for it did otherwise properly and timely file its objections. This fact alone does not present sufficient reason for this court to strike the defendant's pleading or refuse consideration of it.

B. TIMELINESS OF THE MOTION

1. Generally

While the express language of Fed.R.Civ.P. 26 does not set limits within which a motion for protective order must be made,

there is an implicit requirement that the motion be timely, or seasonable. See, e.g., Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C.1991); Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 487 (D.N.J.1990);. See also, Wright & Miller, 8 Federal Practice and Procedure, § 2035 (2nd Ed. 1994). A motion for protective order is timely if made prior to the date set for the discovery. See, e.g., Wang v. Hsu, 919 F.2d 130, 131 (lOth Cir.1990); Brittain, 136 F.R.D. at 413; United States v. International Business Machines, 70 F.R.D. 700, 701 (S.D.N.Y.1976) ("Such motions under Rule 26(c) must be served before the date set for production."); Hon. David Hittner, Federal Civil Procedure Before Trial, p. 11-35 ("A motion for protective order should be noticed at the earliest possible time and certainly before the discovery procedure is to occur."). In this case, the defendant's motion for a protective order was filed after its deadline to respond to the plaintiff's request for production of documents, and was therefore untimely as it was not made prior to the deadline for the discovery in question.

Further, the defendant can find no solace in pointing the finger back at the plaintiff for his failure to present the issue to the court via a Motion to Compel or for some type of conference with the court. A timely motion for a protective order by the party seeking relief from the obligation to comply with a discovery request is the best manner in which to have privileged documents shielded from the discovery process.

Defendant argues, that for written discovery, it is sufficient that it note its objections within the time permitted, and that it should not have to move for a protective order until after the plaintiffs move to compel the discovery. Nothing in Rule 26 suggests that there should be such a dichotomy between oral depositions and written discovery. The procedure turns the

normal state of obligations on its head. The party seeking the protective order, who has the burden of requesting and supporting it, should also be responsible for initiating the process. Permitting that party to merely note its objections and then sit back and wait for a motion to compel can only serve to prolong and exacerbate discovery disputes. Brittain, 136 F.R.D. at 413 (emphasis added); but see Wright & Miller, 8 Federal Practice and Procedure § 2035, p. 481 ("A party may not remain completely silent when it regards discovery as improper. If it desires not to ... respond, it must object properly or seek a protective order ... "). This court agrees with the court in Brittain, and the defendant should have brought this matter to the attention of the court before the time expired for his response to the plaintiff's request for production. As the defendant is the party seeking to protect the documents from disclosure in this case, it should not be allowed to sit back and force the plaintiff to take the initiative to file a Motion to Compel with this court.

The Magistrate Judge was not required to deny outright the defendant's motion as untimely, however. If the defendant can demonstrate good cause for its failure to timely file, a meritorious motion for protective order may nevertheless be granted. Brittain, 136 F.R.D. at 414; Wright & Miller, 8 Federal Practice and Procedure § 2035, p. 478 ("[T]he courts still consider the timeliness of a motion and look to all of the circumstances in determining whether the motion is untimely."). While the Magistrate Judge had the discretion to deny the defendant's motion as untimely in this case, the defendant was entitled to the opportunity to demonstrate good cause in explanation of its failure to timely file. It is not clear from the Magistrate Judge's order that she employed this standard or considered in this particular context any proffered explanation of the defendant for its failure to timely file a motion for protective

order. Were this the only justification for denying the defendant's motion as untimely, the undersigned would return this matter to the Magistrate Judge for a determination of the defendant's proffered "good cause" for its failure to timely file. As noted below, however, the Magistrate Judge had more than one sufficient reason to deny the motion.

2. Timeliness of the motion in light of the Uniform Plan

The Magistrate Judge did not, however, address the "timeliness" issue as it has thus far been discussed by this court. Rather, she determined that the motion was untimely with respect to a provision of this court's Uniform Plan for the implementation of the Civil Justice Reform Act of 1990. 28 U.S.C. § 471 et seq. Magistrate Judge Alexander noted that the defendant filed its motion for protective order with the court on August 26, 1996, two days before the expiration of the discovery deadline. When considering the time allowed for briefing under Local Rule 8(d), the Magistrate Judge reasoned, there was no practical way for the matter to be resolved prior to the expiration of the discovery deadline. See Uniform Civil Justice Expense and Delay Reduction Plan (hereinafter "Uniform Plan"), Section Four (II)(A) ("All discovery motions must be filed so that they do not affect the discovery deadline."). The Magistrate Judge further stated in her order:

> To exacerbate matters, defendant stated in its motion that it "desires to supplement this motion with the deposition testimony of Robert Sinke after that transcript is received ... in order that this Court can fully understand the issues raised in this motion." Defendant then waited until September 6, 1996-nine days after expiration of

> the discovery deadline--to serve its proposed "supplement." Aside from the fact that supplementation of this sort is not contemplated anywhere in the local rules that govern this court, defendant used its supplementation not only to produce the deposition of Mr. Sinke, but also to cite new cases and make new legal arguments not expressly included in its August 26, 1996 motion. Defendant will not be allowed to circumvent the discovery deadline in this fashion.

Maxey, (Order Denying Motion for Protective Order, p. 2).

The undersigned notes that the defendant itself acknowledges that the documents it seeks to protect would otherwise be responsive to a request for production of documents propounded by the plaintiff on July 24, 1996. Understandably, some time would have been required to make a good faith attempt at resolution of this matter prior to seeking a protective order from the court. Fed.R.Civ.P. 26(c). Nevertheless, the purpose of Section Four (II)(A) is to facilitate the expedient resolution of litigation by preventing unnecessary extensions of the discovery period. Having all discovery disputes before the court prior to the expiration of the discovery period enables this court to resolve those disputes quickly and hopefully permit the parties to conduct any "follow up" discovery which results from the disputed discovery within the pre-established discovery period.

From the facts that have been presented to this court, the defendant should have been aware of the need for a protective order in sufficient time for it to file its motion in compliance with both Fed.R.Civ.P. 26(c) as well as Section Four (II)(A) of the Uniform Plan. Therefore, the Magistrate Judge was well within her discretion to deny the defendant's motion as untimely on this basis. Here again, denial of an untimely motion is not an absolute rule. It has been this court's practice to allow the late movant to demonstrate "good cause" for its failure to timely file and to permit late filings when they are supported with such "good cause." As previously noted, the Magistrate Judge's order does not contain anything which indicates to this court that the Magistrate Judge sought explanation for the untimely filing or considered such a "good cause" exception.

C. TIMELINESS OF THE CLAIMS OF PRIVILEGE

Finally, the Magistrate Judge determined that the defendant had waived its assertion of privilege which served as the basis for its motion for a protective order:

> Moreover, defendant did not make a claim of privilege in a timely manner. Defendant produced the documents in question for in camera review by the court. The documents appear to have been generated during late 1989 and early 1990, and there does not seem to be any dispute between the parties regarding the documents' relevancy to this lawsuit. Because the documents were in existence well in advance of the filing of this

> lawsuit, and the defendant does not claim that the documents came to light only recently, they should have been disclosed, or a claim of privilege made, as part of the defendant's pre-discovery disclosure of core information or a supplement thereto. At the absolute latest, defendant should have made an effective claim of privilege in response to plaintiff's request for production of documents.

Maxey, Civil Action No. 3:95cv6-D-A (N.D.Miss. Sep. 19, 1996) (Order Denying Motion for Protective Order, p. 3). The Magistrate Judge went on to explain that the defendant failed to comply with the requirements of Fed.R.Civ.P. 26(b)(5) when it responded to the plaintiff's request for production of the documents in question by merely stating "the information is protected from disclosure by the work product doctrine and the attorney-client and self-critical analysis privileges. When GM investigates the kind of allegations plaintiff describes in this request, it is either in response to, or in anticipation of, litigation."

The undersigned agrees with the Magistrate Judge that the defendant failed to adequately assert its claim of privilege in a timely manner. The Uniform Plan requires that such assertions of privilege must be made at the time of their initial disclosures to the opposing party, and the defendant should have at least

supplemented its initial disclosures[1] as the Uniform Plan

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[1]Pursuant to amendments to the Uniform Plan made effective July 1, 1996, Section Four (I)(A)(l)(b) requires that:

> When a party withholds information by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things that produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. The privilege log should contain at least the following information: name of the document; description of the document; date; author(s); recipient(s); and nature of the privilege. To withhold materials without such notice subjects the withholding party to sanctions under Rule 37, FRCP, and may be viewed as a waiver of the privilege or protection.

While the defendant's initial disclosures in this case

requires. Uniform Plan, Section Four (I)(A)(7). As well, the defendant's response to the plaintiff's request for production for these documents was insufficient to meet its obligation under the Federal Rules of Civil Procedure. Fed.R.Civ.P. 26(b)(5) (stating party seeking protection of privilege "shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). The generalized response of the defendant to the Plaintiff's request for production was merely an assertion of the privilege itself, and does not explain the nature of the documents such that anyone could assess the applicability of the privilege claimed. The defendant argues that if this conclusion is correct, then the plaintiff's discovery responses were also deficient. That matter is not before the court, and is irrelevant in any event. The Magistrate Judge was well within her discretion in deeming the privilege waived in this case, particularly in light of the inadequate response provided to the request and to provide a description of the document in a supplementation to its initial disclosures. Fed.R.Civ.P. 26(b)(5). This court cannot say that the Magistrate Judge's decision in this matter is either clearly erroneous or contrary to law.

III. CONCLUSION

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were served before this amendment became effective, this enactment governed the defendant's obligation to make supplemental disclosures after July 1, 1996.

The Magistrate Judge had a sufficient reason to deny the defendant's motion for a protective order, in that the defendant had waived the asserted privilege by failing to adequately present its claim of privilege. The Magistrate Judge also possessed the discretion to deny the defendant's motion as untimely for two different reasons, but there is nothing before the court that indicates that she entertained the defendant's proffer of "good cause" reason for the untimely filing. In any event, as the Magistrate Judge had a valid ground for the denial of the motion, this court shall not disturb the order. This court cannot say that the Magistrate Judge's order in this matter was either clearly erroneous or contrary to law.

A separate order in accordance with this opinion shall issue this day.

This the 18th day of November 1996.

/s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

ARCHIE MAXEY, PLAINTIFF

v. Civil Action No. 3:95cv6-D-A

GENERAL MOTORS CORPORATION DEFENDANT

MEMORANDUM OPINION

By order dated September 19, 1996, United States Magistrate Judge S. Allan Alexander denied the defendant's motion for a protective order to prevent the disclosure in discovery of internal documents related to an entity known as the "Ad Hoc Passive Restraint Committee." Maxey v. General Motors Corp., Civil Action No. 3:95cv006-D-A (N.D. Miss. Sep. 19, 1996) (Alexander, M.J.) (Order Denying Motion for Protective Order). In denying the motion, Magistrate Judge Alexander ordered that the defendant General Motors "shall produce forthwith to plaintiff the documents at issue." Aggrieved with the decision of the Magistrate Judge, General Motors presented to this court objections to the Magistrate Judge's order. This court, upon consideration of the objections, declined to disturb the Magistrate Judge's decision. Maxey v. General Motors Corp., 1996 WL 692222, *1 (N.D.Miss. Nov.15, 1996) (Civil Action No. 3:95cv006-D-A) (Davidson, J.) (Memorandum Opinion and Order). General Motors then requested that this court reconsider its ruling of November 15, or

in the alternative, grant the certification of an interlocutory appeal of that decision pursuant to 28 U.S.C. § 1292(b). This court denied reconsideration and also denied the request for alternative relief. Maxey v. General Motors Corp., 1996 WL 737537, *1 (N.D.Miss. Dec.16, 1996) (Civil Action No. 3:95cv006-D-A) (Davidson, J.) (Memorandum Opinion and Order).

As this court noted in its December 12 Memorandum Opinion, this court's denial of certification pursuant to 28 U.S.C. § 1292 (b) was unappealable. See, e.g., In re Air Crash Disaster, 821 F.2d 1147, 1167 (5th Cir.1987) ("The decision to certify an interlocutory appeal pursuant to section 1292(b) is within the discretion of the trial court and unappealable.") (citing In re McClelland Engineers, Inc., 742 F.2d 837, 839 (5th Cir.1984), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985)). Therefore, General Motors instead sought other relief which was available to it. On December 19, 1996, GM petitioned the Fifth Circuit Court of Appeals for a Writ of Mandamus to be issued to this court:

> vacating the trial court's order requiring production of documents over GM's claims of privilege and directing it to rule on the substantive merits of GM's privilege claims.
>
> General Motors additionally petitions . . . for a limited writ of mandamus directing the District Court to stay its November 18 order pending resolution of this mandamus petition.

Petition for Writ of Mandamus, p. 24. The Fifth Circuit denied the petition on January 6, 1996. Maxey v. General Motors, No. 96-60861 (5th Cir. Jan. 6, 1997) (Order Denying Petition for Writ of Mandamus). To the present extent of the court's knowledge, General Motors has not yet complied with Magistrate Judge Alexander's order of September 15.

I. The present state of affairs

Even in light of all of the above, Magistrate Judge Alexander's September 19 order remains in force and the defendant General Motors must still "produce forthwith to plaintiff the documents at issue." Neither this court nor the Fifth Circuit Court of Appeals has stayed that ruling. In light of the facts of this case and of the Fifth Circuit's recent denial of General Motors' petition for a writ of mandamus, the court shall provide GM with another opportunity to produce these documents. The defendant shall comply with the September 19 order on or before 12:00 p.m. on Friday, January 17, 1997.

In the event that General Motors fails to comply with today's directive from the court, the undersigned shall fashion an appropriate remedy. This court has already been required to repeatedly sanction General Motors throughout this litigation for its conduct. E.g., Maxey, Civil Action No. 3:95cv006-D-A (N.D.Miss. Apr. 16, 1996) (Order imposing sanctions against GM); (N.D.Miss. Jul. 18, 1996) (Order imposing sanctions against GM); (N.D.Miss. Nov. 11, 1996) (Order imposing sanctions against GM). Thus far, the imposition of lesser monetary sanctions appears to be ineffective. In light of General

Motors' net worth, a more proportionate monetary sanction may be required. Of course, the simple imposition of monetary sanctions is not this court's only option. This court may incarcerate the defendant's corporate representatives or its counsel for civil contempt, strike parts of the defendant's pleadings in this cause or even enter judgment against it on the plaintiff's claims. Should GM fail to comply with this court's orders and the undersigned determine that the imposition of sanctions are appropriate, the undersigned will have no reservations in imposing whatever sanction or combination of sanctions that are required. Likewise, this court will have little patience for incomplete compliance with the court's orders. Any failure on the part of General Motors to fully comply with this production requirement will also subject it and its counsel to scrutiny for sanctions.

A separate order in accordance with this opinion shall issue this day.

This the 10th day of January 1997.

/s/ Glen H. Davidson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KENNETH M. AND SARAH M. BARANOWSKI,

Plaintiffs

vs. No. LR-C-96-222

GENERAL MOTORS CORPORATION, ET AL.,

Defendants.

MEMORANDUM AND ORDER

This suit involves an automobile accident in which Kenneth Baranowski was driving a 1989 Oldsmobile Cutlass Supreme coupe, and his wife, Sara Baranowski, was seated in the front passenger seat. The plaintiffs' car collided with another vehicle and at some point during the accident, Sara Baranowski was ejected from the car. The plaintiffs have brought claims against the defendants, alleging that the door latch and seat belt system of the Cutlass are defective and are the cause of Sara Baranowski's injuries.

Now before the Court is the motion of the defendant General Motors Corporation ("GM") for a protective order, to which the plaintiffs have responded, GM has filed a reply, and the plaintiffs have responded to the reply. Upon careful review of the pleadings, the Court finds that the motion should be denied.

I.

Defendant GM states in its motion that certain interrogatories and requests for production of documents propounded by the plaintiffs require the disclosure of documents and information pertaining to a GM committee known as the Automatic Restraint Task Force ("Task Force"). The Task Force, GM states, was made up of GM engineers and was created in 1989 at the request of GM legal staff "who sought to formulate legal advice and litigation strategies in connection with claims made against GM alleging defects in the passive restraint systems installed in a variety of GM vehicles." Defendant GM asserts the documents are protected from disclosure by the attorney-client privilege and the work-product doctrine.

Plaintiffs contend that the motion was untimely filed and therefore GM has waived the privilege. In addition, they argue that the documents are not privileged and are not work product.

On April 18, 1996, the plaintiffs served their First Requests for Production of Documents, which included the following challenged request:

> Request for Production No. 19: Produce a copy of any reports generated by GM's "Motors Insurance Corp." or any other statistical or accident data collected by Leonard Evans or any GM employee(s) or contractor that addressed ejection of belted occupants in motor vehicle accidents.

On June 4, 1996, the plaintiffs served their Second Interrogatories and Requests for Production of Documents, which included the following challenged interrogatories:

> Interrogatory No. 55: Please list any and all information which Defendant has regarding any known accidents or failures involving the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism.
>
> Interrogatory No. 56: Please list any accidents which Defendant may have heard about with regard to the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism but were not verified.
>
> Interrogatory No. 57: Please list any investigations by Defendant of reported failures or accidents relating to the 1989 Oldsmobile Cutlass Supreme and other GM vehicles that have the same or similar passenger restraint system and/or the same door latch mechanism.

> Interrogatory No. 58: Please list any claims or lawsuits filed against Defendant or its subsidiaries or affiliates (including dealerships) relating to such accidents or failures.

Defendant GM responded to the discovery requests on May 31, 1996 and August 16, 1996 respectively, objecting to these and other requests for production on the grounds that they "may ask for information protected from disclosure by the work-product doctrine and the attorney-client or investigative (or consulting expert) privilege." On March 5, 1997, in response to plaintiffs' motion to compel, GM filed this motion for protective order.

A.

The plaintiffs urge that GM waived its privilege claims because it failed to comply with Fed.R.Civ.P. 26(b)(5) which provides: "When any party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

The plaintiffs assert that GM did not describe the nature of the documents it claimed to be privileged, and cite the Comment to Rule 26 which states: "A party must notify other

parties if it is withholding materials otherwise subject to disclosure under the rule or pursuant to a discovery request because it is asserting a claim of privilege or work product protection. To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." The plaintiffs urge that because of other litigation[1], GM was fully aware of the existence of the Task Force documents when it set forth blanket privilege objections without any reference to any particular documents or categories of documents. The plaintiffs further complain that GM filed its motion for protective order months after the responses were served and did not supplement its responses in order to inform the plaintiffs of the existence of the Task Force documents.

Defendant GM contends that no specific discovery request required production of the Task Force documents. It also argues that because the requests that arguable call for production of Task Force documents also ask for a large number of documents unrelated to the subject matter of the lawsuit, the Task Force documents are not "otherwise discoverable" and are not responsive to any appropriate request for production.

"Whether a responding party states a general objection to an entire discovery document on the basis of privilege, or generally asserts a privilege objection within an individual

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[1]*See* Pls.' Am. and Sub. Resp. to Defs.' M. Protective Order, Ex. D.

discovery response, the resulting "blanket objection" is decidedly improper. This fact should no longer be "news" to a responding party." *Eureka Financial Corp. v. Hartford Accident & Indem. Co.*, 136 F.R.D. 179, 182 (E.D. Cal. 1991) (citations omitted).[2] Concerning GM's argument that the discovery requests ask for large numbers of documents that are unrelated to the subject matter of the lawsuit, the Advisory Committee's Notes to Rule 26(b)(5) state the procedure that should be followed:

> If a broad discovery request is made - for example, for all documents of a particular type during a twenty year period - and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection to the breadth of the request and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld under the claim of privilege. If the court later rules that documents for a seven year period are properly discoverable, the documents for the additional four year should then be either produced (if not privileged) or described (if claimed to be privileged).

The Court finds that GM waived any privilege claim on the Task Force documents by failing to object and list the documents in compliance with Rule 26(b)(5). Defendant GM failed to fulfill its responsibility of supplying relevant

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[2]This opinion was written in anticipation of the codification of paragraph 5 of Rule 26(b).

information underlying its claim of privilege in compliance with Rule 26(b)(5). It seems to the Court that GM could have at least mentioned "Task Force Documents" in response to one if not more of the challenged interrogatories and requests for production. However, GM made no effort to comply with a reasonable identification effort. This fact as well as GM's knowledge of the existence of the Task Force documents mitigates in favor of denying the motion for protective order and compelling disclosure.

B.

In addition, the Court finds that the Task Force documents lost any privilege status when the findings and conclusions of the Task Force were communicated to door design engineers who incorporated those findings into automobiles. Mr. Robert Sinke, who was the director of GM Engineering Analysis Group, a group of engineers who functioned as technical consultants to the GM legal staff, stated that the findings of the Task Force were first communicated to GM's General Technical Committee and then, at that Committee's request, they were communicated to the appropriate door and door latch type engineers. *See* Pls.' Am. and Sub. Resp. to Defs.' M. Protective Order, Ex. G.

As the court stated in *Courteau v. St. Paul Fire & Marine Ins. Co.*, 821 S.W.2d 45, 47-48 (Ark. 1991): "'The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. . .'" (*quoting Philadelphia v.*

Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962). Based upon the testimony of Sinke, the Court finds that the documents produced by the Task Force are not protected by the attorney-client privilege.

The Court further finds that the Task Force documents are not protected by the work-product doctrine. The work-product doctrine is governed by Fed.R.Civ.P. 26(b)(3), and it applies only to documents "prepared in anticipation of litigation." *Peterson v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992). The protection applied to the mental processes of attorneys and allows lawyers to work with a certain degree of privacy. *Upjohn Co. v. United States*, 449 U.S. 397-399 (1981). Even documents prepared in anticipation of litigation, however, may be discoverable upon a showing of (1) substantial need and (2) an inability to obtain the documents by other means without undue hardship. Fed.R.Civ.P. 26(b)(3).

The Court finds that many of the documents were prepared predominantly by a team of engineers as opposed to attorneys, while others include charts and statistics that do not constitute legal analyses. In addition, the Court finds that the plaintiffs are unable to obtain the documents by other means without undue hardship.

II.

IT IS THEREFORE ORDERED that the motion for protective order filed by defendant General Motors Corporation (doc. 25) is denied.

DATED this 15th day of May, 1997.

/s/ Susan Webber Wright
United States District Judge